



Conditional Right-of-Way Certification Questions and Answers

What is “conditional” right-of-way certification?

Conditional right-of-way (ROW) certification identifies the acquisition status of ROW that is required to advance a highway project to construction when such property has not yet been acquired, the acquiring agency has not yet obtained right-of-occupancy, or future displacees are still residing on such property. Conditional ROW certification, which is provided for in 23 CFR 635.309(c)(3), is sometimes called a “cert 3” or a “work around.”

Under what circumstances can a conditional ROW certification be used?

A conditional ROW certification be used when the state (or local public agency) ensures that any occupants who have not yet moved “...are protected against unnecessary inconvenience and disproportionate injury or any action coercive in nature.” The State (or local public agency) must also provide “...a realistic date when physical occupancy and use is anticipated as well as substantiation that such date is realistic.”

The regulation says the State may request authorization for a conditional right-of-way certification “...only in very unusual circumstances.” The regulation further states: “This exception must never become the rule.” Do these two sentences restrict the ability to use the conditional ROW certification?

The authorization of construction prior to the completion of acquisition and relocation presents some risks. One risk is that any delay in obtaining access to the properties in question may result in contractor claims. Another risk is that the proximity of construction activities coerce the property owners and/or displaced persons to make decisions that are not in their best interest. As the regulation states, these persons must be protected from unnecessary inconvenience, disproportionate injury, and actions coercive in nature.

Should we begin using conditional ROW certifications on a regular basis?

The conditional ROW certification is one of a number of tools available to States and local public agencies for advancing projects to construction in a timelier manner. As with any tool, the conditional ROW certification does come with certain risks. Before choosing to use this tool, the State or local public agency must carefully evaluate those risks and properly document its decisions. In some cases approval from the FHWA Division Office may be required.

More Information

For more information about functional replacement or other types of flexibilities in ROW, visit FHWA’s Every Day Counts website (www.fhwa.dot.gov/everydaycounts/projects/toolkit/row.cfm) or contact Virginia Tsu, FHWA Office of Real Estate Services, at (202) 366-2042 or virginia.tsu@dot.gov.